Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matters of	)	
	)	
GTE Corporation, Transferor,	)	
	)	
And	)	CC Docket No. 98-184
	)	
Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorization and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License	)	

MEMORANDUM OPINION AND ORDER

Adopted: May 19, 2003 **Released: May 20, 2003**

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Order, we deny Verizon Communications, Inc.'s ("Verizon") request to overturn or modify an Investigations and Hearings Division ("Division") interpretation regarding certain compliance requirements in the *Bell Atlantic/GTE Merger Order*.[1] Specifically, we uphold the Division's interpretation of the formula Verizon must use to calculate certain voluntary payments that it makes under the *Bell Atlantic/GTE Merger Order's* Carrier-to-Carrier Performance Plan ("Performance Plan").

II. BACKGROUND

2. In the *Bell Atlantic/GTE Merger Order*, the Commission adopted, with modifications, certain voluntary conditions submitted by Bell Atlantic and GTE intended to mitigate any public interest harms that might otherwise arise from the merger.[2] Under Condition V of the merger conditions – the Performance Plan – the merged company, now Verizon, must report performance measurements designed to help the Commission assess the quality of service elements that Verizon provides to competitive local

[1] *Applications of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License, CC Docket No. 98-184,* Memorandum Opinion and Order, 15 FCC Rcd 14032 (2000) ("*Bell Atlantic/GTE Merger Order*").

[2] *Id.* at para. 96. The merger conditions are contained primarily in Appendix D of the Merger Order.

exchange carriers ("CLECs").[3] The Performance Plan acts as a self-executing mechanism to offset the risk that Verizon would discriminate against CLECs in the provision of unbundled network elements and other telecommunications services.[4] The Performance Plan consists of two parts. First, Verizon must report monthly performance data that measures the quality of service that Verizon provides to CLECs.[5] Second, if Verizon fails to meet certain performance goals established in the Performance Plan, it must make voluntary contributions to the U.S. Treasury.[6] The merger conditions provide detailed instructions on how to calculate Verizon's voluntary payment obligations based on its monthly performance data.[7]

3. Verizon's compliance with the merger conditions, including the Performance Plan, is subject to an annual independent audit.[8] In discussions with the audit staff of the Division, the independent auditor requested an interpretation of one provision of the Performance Plan's voluntary payment formula.[9] Specifically, the independent auditor asked whether the payment formula for measurements using averages or means (*e.g.*, Trouble Duration Interval, OSS Response Time) permits Verizon to apply a cap—in addition to other caps included in the calculation formula—to a factor in the payment formula midway through the calculation process.[10] On May 29, 2002, the Division responded that the formula does not allow Verizon to apply such a cap, *i.e.*, to cap the difference between the actual average service to CLECs and a certain calculated average reflecting the minimum acceptable level of

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[3] In particular, the Performance Plan requires Verizon to report on 17 categories of measurements: OSS Response Time; OSS Availability; Order Confirmation Timeliness; Reject Timeliness; Percent Flow Through/Achieved Flow Through; Completed within Specified Number of Days (1-5 Lines); Missed Appointments; Facility Missed Orders; Installation Quality; Hot Cut Loops; Trouble Report Rate; Missed Repair Appointments; Trouble Duration Intervals; Repeat Trouble Reports; Percent Final Trunk Group Blockage; Collocation Performance; Timelines of Carrier Bill. *See id.* at Appendix D, Attach. A-1a, Attach. A-1b.

[4] *Bell Atlantic/GTE Merger Order* at para. 279-80.

[5] *Id.* at para. 279; *see id.* at Appendix D, para. 16 (describing Performance Plan), Attach. A (describing business rules for performance measurements). These measures were developed in state collaborative proceedings in New York and California under the auspices of their state public utility commissions. *See Bell Atlantic/GTE Merger Order* at para. 281.

[6] *Id.* at para. 280; *see id.* at Appendix D, para. 16.

[7] *Id.* at Appendix D, Attach. A-3, Attach. A-4, Attach. A-5.

[8] *Id.* at Appendix D, paras. 56-57. The audit function under the merger conditions was originally delegated to the Accounting Safeguards Division of the former Common Carrier Bureau. Effective March 25, 2002, this function was transferred to the Investigations and Hearings Division of the Enforcement Bureau. The review of Verizon's request for interpretation at issue here falls under that audit responsibility. *See Establishment of the Media Bureau, the Wireline Competition Bureau and the Consumer and Governmental Affairs Bureau, Reorganization of the International Bureau and Other Organizational Changes*, Order, 17 FCC Rcd 4672 (2002) (reorganizing the former Common Carrier Bureau into the Wireline Competition Bureau and delegating to the Enforcement Bureau certain audit functions formerly delegated to the Common Carrier Bureau).

[9] *See* Letter from John Horan, PricewaterhouseCoopers, LLC, to Anthony Dale, Assistant Chief, Investigations and Hearings Division, Enforcement Bureau, FCC (April 1, 2002) ("*April 1, 2002 Auditor Letter*").

[10] *See id.* at 1-2. Verizon's voluntary payment amount is also subject to specific caps identified in the merger conditions and labeled as such. *See Bell Atlantic/GTE Merger Order* at Appendix D, Attach. A-4.

Verizon's service.[11] On September 20, 2002 and October 3, 2002, Verizon submitted requests to the Bureau seeking review of the Division's interpretation.[12] Verizon contends that the voluntary payment formula allows the use of an additional cap and that the Bureau should apply such a cap for Verizon because the Common Carrier Bureau had approved a similar cap for SBC Communications, Inc.'s ("SBC") Carrier-to-Carrier Performance Plan mandated by the *SBC/Ameritech Merger Order*.[13]

III. DISCUSSION

4. We conclude that the merger conditions do not permit Verizon to apply an additional cap midway through the calculation process for performance measures using averages or means.[14] In so ruling, we reject Verizon's claim that application of the formula without an additional cap will cause Verizon to make more voluntary payments than actual occurrences of the inadequate service. Finally, we disagree with Verizon that it is similarly situated to SBC, thereby warranting the requested cap. As discussed below, the public policy considerations that led to a modification of SBC's Performance Plan are not present here.[15]

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[11] *See* Letter from Maureen F. Del Duca, Deputy Chief, Investigations and Hearings Division, Enforcement Bureau, FCC to William M. Coburn and John Horan, PricewaterhouseCoopers, LLC (May 29, 2002) ("*Division May 29, 2002 Letter*").

[12] *See* Letter from Joseph DiBella, Regulatory Counsel, Verizon, to David Solomon, Chief, Enforcement Bureau, FCC (September 20, 2002) ("*Verizon September 20, 2002 Letter*"); Letter from Joseph DiBella, Regulatory Counsel, Verizon, to David Solomon, Chief, Enforcement Bureau, FCC (October 3, 2002) ("*Verizon October 3, 2002 Letter*"). Verizon seeks Bureau review of the Division interpretation that will result in a formal Bureau order reviewable by the Commission under Section 1.115 of the Commission's rules. *See Verizon September 20, 2002 Letter* at 1.

[13] *See* Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules, CC Docket 98-141, *Memorandum Opinion and Order*, 14 FCC Rcd 14712 (1999 ("*SBC/Ameritech Merger Order*").

[14] The *Bell Atlantic/GTE Merger Order*'s Performance Plan authorizes the use of two types of payment caps. First, the Performance Plan allows for "monthly state-specific caps" that total, across all states, as much as \$259 million in the first year, \$389 million in the second year, and \$516 million in the third year (*i.e.*, a total of up to \$1.164 billion over three years). *Bell Atlantic/GTE Merger Order* at para. 280. The amount of the monthly state-specific caps is contained in an attachment to the Performance Plan. *See id.* at Appendix D, Attach. A-6. Second, the Performance Plan allows for "Per Measurement/Per Occurrence Caps," which cap the voluntary payment amount Verizon makes for each measurement. The amount of the Per Measurement/Per Occurrence Caps varies depending on the dollar value of the measurement (*i.e.*, High, Medium, or Low) and the size of the state in which Verizon failed the relevant performance standards. *See id.* at Appendix D, Attach. A-4.

[15] The practical effect of this decision applies to only a limited subset of measurements in the Performance Plan. Specifically, this decision governs the calculation of Verizon's voluntary payments for the three categories of performance measurements—Trouble Duration Interval, OSS Response Time, and Missed Appointments—that use averages or means. Of the 159 submetrics in the Performance Plan, these three categories account for eight submetrics, or 5% of the total. Moreover, under the terms of the merger conditions, the Performance Plan is no longer applicable in fourteen of Verizon's states. *See* Verizon No Longer Required to Report Rhode Island, Vermont, Maine, New Jersey, New Hampshire, Delaware, Virginia, Maryland, Washington D.C., and West Virginia Performance Measurement Results under Bell Atlantic/GTE Merger Conditions, Public Notice, DA 03-1114 (WCB 2003). *See also Bell Atlantic/GTE Merger Order* at Appendix D, para. 17. In addition to the states (continued....)

A. *The language and rationale of the voluntary payment formula do not require an additional cap to ensure that Verizon does not make contributions for more than the actual number of observations.*

5. First, the formula for calculating voluntary payments for performance measurements using averages or means does not allow Verizon to apply an additional cap midway through the process. The Performance Plan requires Verizon to make voluntary payments to the U.S. Treasury based on the quality of its performance, the volume of activity in the service in question, and the dollar value assigned to each category of service.[16] The Performance Plan spells out a four-step process for calculating the amount of Verizon's payments.[17] First, Verzion must calculate the average or mean for the measurement that would yield a minimum acceptable value (referred to as "the Critical Z-value" in the technical language of the Performance Plan) that represents Verizon's minimum provision of service that, at the least, would not result in a voluntary payment obligation.[18] Second – and this is the step at issue – Verizon must calculate "the percentage difference between the actual average and the calculated average" (*i.e.*, the "percentage difference"). This second step measures the quality of Verizon's performance.[19] Third, Verizon must multiply the total number of data points (*i.e.*, the volume of activity, also referred to as the number of "occurrences" or "observations") by the percentage difference.[20]

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listed in the foregoing Public Notice, Verizon no longer must report performance measurements for Massachusetts, Connecticut, Pennsylvania, and New York.

[16] *Bell Atlantic/GTE Merger Order* at para. 280; *see id.* at Appendix D, para. 16.

[17] The calculation formula varies slightly depending on whether the performance measurement uses an average (or means) or whether it uses some other number, such as a percentage. The payment formula discussed in this Order is used for the three measurements listed above, *i.e.,* Trouble Duration Interval, OSS Response Time, and Missed Appointments.

[18] In the technical language of the merger conditions, the Critical Z-value is the level at which Verizon could provide service to CLECs without incurring an obligation to make voluntary payments. *See Verizon September 30, 2002 Letter* at 2 (describing the Critical Z-value). In other words, the Critical Z-value establishes the minimum performance standard – if Verizon's service quality drops below the Critical Z-value, it incurs payment obligations; if it meets or exceeds the Critical Z-value, Verizon incurs no payment obligations.

[19] If Verizon's performance fails to reach the minimum level by a wide margin, the resulting percentage difference could exceed 100%, and thereby yield a correspondingly large voluntary payment obligation. *See* paragraph 8, *infra*.

[20] *Bell Atlantic/GTE Merger Order* at Appendix D, Attach. A-3. Specifically, the language of the merger conditions states:

> Step 1: Calculate the average or the mean for the measurement for the CLEC that would yield the Critical Z-value for the third consecutive month. Use the same denominator as the one used in calculating the Z-statistic for the measurement.
>
> Step 2: Calculate the percentage difference between the actual average and the calculated average (or benchmark value for benchmark measures) for the third consecutive month.
>
> Step 3: Multiply the total number of data points by the percentage calculated in the previous step. Calculate the average for three months and multiply the result by $1500, $900, and $600 for Measurements that are designated as High, Medium, and Low respectively, to determine the applicable assessment payable to the U.S. Treasury for that measure.

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Finally, the payment formula requires Verizon to multiply the result derived from the previous three steps by the dollar value for each category of measurement.[21] Pursuant to the merger conditions, Verizon must execute this process on its own and, to the extent it misses its minimum acceptable performance levels for three months in a row, make the appropriate voluntary payments to the U.S. Treasury by a certain deadline.[22]

6. In short, there is simply nothing in the plain language of the formula that supports Verizon's use of an additional cap in the second step, *i.e.*, a cap of 100% on the percentage difference in the second step.[23] The merger conditions state that Verizon must "[c]alculate the percentage difference between the actual average and the calculated average." Nowhere does this instruction state or suggest that Verizon may limit the calculated result from this step to 100% or less. As the independent auditor correctly noted, the payment formula "does not explicitly cap the percentage difference between the actual means/averages and the relevant [minimum acceptable performance value]."[24] We note that the merger conditions expressly provide for the use of caps in other aspects of the instructions for calculating voluntary payments.[25] Given the express language of the payment formula, the omission of any language in the second step suggesting that an additional cap may be used, and the explicit provision for caps to the voluntary payments in other sections of the payment formula, we conclude that the condition does not allow the use of an additional cap.

7. Notwithstanding the plain language of the *Bell Atlantic/GTE Merger Order*, Verizon argues that an additional cap in the second step is necessary to ensure that Verizon will not pay for more observations of poor performance than the number that actually occurred.[26] As detailed above, the overall structure of the formula makes the amount of Verizon's voluntary payment a function of the minimum acceptable level of performance, the actual level of performance, the volume of activity, and the assigned dollar value for the measurement.[27] In this way, the Performance Plan recognizes that

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Bell Atlantic/GTE Merger Order at Appendix D, Attach. A-3 (at pg. A-3-4). Step 3 above actually consists of two sub-steps: (a) multiplying the result of Step 2 by the number of data points (also referred to as "occurrences" or "observations"); and (b) multiplying that result by one of the three monetary amounts.

[21] The performance measurements are divided into three categories for assessing a dollar value for the purposes of voluntary payments. Verizon multiplies the result by $1,500 for "High" category measurements, by $900 for "Medium" category measurements, and by $600 for "Low" category measurements. *See Bell Atlantic/GTE Merger Order* at Appendix D, Attach. A-4.

[22] Under the merger conditions, Verizon only makes voluntary contributions for poor performance if it failed the minimum acceptable performance levels for three months in a row. In these circumstances, the merger conditions require Verizon to make the payment approximately 60 days after the end of the three-month period. Thus, if Verizon misses the minimum acceptable performance levels for January, February, and March, it must make the correct voluntary payments in May.

[23] *Verizon September 20, 2002 Letter* at 2.

[24] *April 1, 2002 Auditor Letter* at 2.

[25] Ultimately, Verizon's voluntary payment amount is subject to the monthly state-specific caps and Per Measurement/Per Occurrence caps identified in the merger conditions and labeled as such. *See Bell Atlantic/GTE Merger Order* at para. 280; *see also id.* at Appendix D, Attach. A-4.

[26] *Verizon September Letter* at 2.

[27] *See* note 25, *supra*.

significantly poor performance and substantial activity (*e.g.*, many trouble reports) warrant an appropriately larger payment to the U.S. Treasury.

8. According to Verizon, because poor performance could (as a practical matter of mathematics) result in a final payment amount equal to a payment amount for a greater number of occurrences in the formula, Verizon argues that it should be allowed to limit the effect of its poor performance on its voluntary payments. In essence, Verizon is mixing the second and third steps of the payment formula. The steps in the formula must be distinguished from one another and applied in the proper sequence. The voluntary payment formula is precise—in the second step, Verizon calculates "the percentage difference" between its actual performance and its minimum acceptable performance (*i.e.*, the latter factor being the result of the first step). To the extent Verizon fails the minimum acceptable level of performance in the second step by a larger margin, the percentage difference will be larger, and, in turn, the voluntary payment will be larger. In cases of seriously poor performance, Verizon could calculate a percentage difference of greater than 100 percent.[28] However, the second step calculation reflects only the relative quality of service—*i.e.*, the gap between ideal performance and Verizon's actual performance—and has nothing to do directly with the number of occurrences or observations. It is only after this second-step computation of the percentage difference that Verizon should proceed to the third step, in which it factors in the number of occurrences (*e.g.*, the number of trouble reports fixed during the reporting period). Thus, a cap on the second step percentage difference midway through the computation is not justified as a way of limiting the amount of Verizon's voluntary payments to the number of occurrences. Instead, the payment formula expressly provides for that limitation in the third step.[29]

9. In any case, other mechanisms under the plan address Verizon's concerns about excessive payments under the Performance Plan. In particular, Verizon's voluntary payments are capped by state and by time.[30] In addition, the calculation methodology at issue – that is, the very formula related to performance measurements using averages or means – also protects Verizon from potential run-away payments by relying on the use of average performance.[31]

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[28] For example, assume that, in a given month, Verizon actually provides circuits to CLECs in an average period of nine days and it provides circuits to itself in a calculated period of three days. Then the computation is: ([9-3]/3) = 2 x 100 = 200%. In these terms, Verizon is contending that the 200% figure reflects more payments than occurrences. With the proposed cap, the 200% difference between the actual average number of days and the calculated number of days would be reduced to 100%, effectively reducing by one-half the calculated payment.

[29] Verizon also claims that when it proposed the Performance Plan, its understanding was that payments would not exceed the per-occurrence amount times the number of occurrences for any performance measurements. *Verizon September Letter* at 2. However, Verizon makes no real showing that this logical and natural ramification of the formula was unforeseeable.

[30] *See* note 25, *supra*.

[31] By using average performance for certain measurements, the Performance Plan recognizes that, in many instances, Verizon may perform far worse than the minimum acceptable level of performance. At the same time, the Performance Plan recognizes that Verizon may perform far better than that level of performance. To implement this recognition, the Performance Plan only requires Verizon to make voluntary payments for measurements using averages or means (*e.g.*, Trouble Duration Interval) when Verizon's average performance falls below a certain specified level. In this way, the use of averages allows good performance to offset poor performance.

B. *Issues of comity and administrative efficiency do not support the use of an additional cap.*

10. Finally, we reject Verizon's argument that this Bureau should apply the same payment methodology to Verizon as the methodology applied to SBC pursuant to the *SBC/Ameritech Merger Order*.[32] In its *October 3, 2002 Letter*, Verizon notes that the Common Carrier Bureau issued a letter that permitted SBC to cap the percentage difference in the second step, as Verizon wishes to do here.[33] In that letter, however, the Common Carrier Bureau stressed that the plain language of the merger conditions did not permit the company to cap the percentage difference at the second step.[34] As the Common Carrier Bureau noted, adding in another cap at the second step of the formula could reduce the voluntary payments paid for poor performance.[35] However, the Common Carrier Bureau found compelling policy reasons to allow the company to apply such a cap because of actions taken by the Texas Public Utility Commission ("Texas Commission") to permit the use of such a cap for purposes of the Texas state plan. The Common Carrier Bureau concluded "that administrative efficiency would be served if SBC were permitted to apply this payment calculation in a fashion that mirrors the Texas performance plan" because part of the federal performance plans for most SBC states are expressly modeled after the Texas Commission plan.[36]

11. Verizon argues that it is similarly situated to SBC in terms of comity and administrative efficiency, and that it would be unreasonable to permit SBC to apply an additional cap to the federal plans of other SBC states than Texas, while denying Verizon the ability to use that same cap. Verizon claims that, if the treatment of the federal plans in all Verizon states is not the same as the treatment of the federal plans in all SBC states other than Texas, then Verizon would be subject to an arbitrary distinction between similarly situated parties.[37]

12. We reject this argument. By their express terms, the Verizon merger conditions require Verizon to apply the performance measurement plans and procedures adopted by the New York and California Commissions to the federal plans of the states in Verizon's service territory.[38] In a similar manner, the *SBC/Ameritech Merger Order* conditions require SBC to apply the performance measurements plans and procedures adopted by the Texas Commission to the federal plans of ten of its thirteen states, *i.e.*, Texas, Oklahoma, Arkansas, Missouri, Kansas, Illinois, Michigan, Ohio, Wisconsin, and Indiana.[39] Under each merger order, changes adopted by the relevant state commissions may be

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[32] *Verizon October 3, 2002 Letter* at 2-3.

[33] *Id.* at 2.

[34] Letter from Carol Mattey, Deputy Chief, Common Carrier Bureau, FCC to Caryn Moir, Vice President – Federal Regulatory, SBC Telecommunications, Inc., 3 (Feb. 6, 2002). The letter states that "[t]he Performance Plan does not, on its face, cap the difference between the levels of service SBC provides to CLECs and the relevant performance standard (*i.e.*, the 'performance gap')." *Id.* at 2.

[35] *Id.*

[36] *Id.* at 2-3.

[37] *Verizon October 3, 2002 Letter* at 2-3, citing *Petroleum Communications, Inc, v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994); *McElroy Electronics v. FCC*, 990 F.2d 1351, 1365.

[38] *Bell Atlantic/GTE Merger Order* at para. 281.

[39] *SBC/Ameritech Merger Order* at para. 379.

imported into the Performance Plan required by the federal merger conditions.[40]

13. Unlike the circumstances facing SBC, we are not aware of any modifications allowing an additional cap midway through the payment formula in the New York or California state plans, and Verizon has not argued that these state commissions have made such modifications to their states plans. Accordingly, the considerations of comity and administrative efficiency on which Verizon relies are not in fact applicable to Verizon, and, therefore, SBC and Verizon are not similarly situated in the relevant sense. Furthermore, the *Bell Atlantic/GTE Merger Order* and the *SBC/Ameritech Merger Order* use different approaches to address unique harms that the Commission found in each case. As a result, their merger conditions differ in a variety of respects, including the details of the respective Performance Plans. We note that, to the extent the New York or California state commissions modify the payment formula, Verizon remains free to request comparable treatment at the federal level in accordance with the process that the Commission established in the merger conditions.

C. *Conclusion*

14. In sum, we conclude that neither the voluntary payment formula, an alleged excess of payments relative to occurrences, nor any comity or administrative considerations support allowing Verizon to cap the percentage difference term in the second step of the computation. Accordingly, we uphold the Division's earlier interpretation and deny Verizon's request.

IV. ORDERING CLAUSES

15. For the reasons discussed above, IT IS ORDERED that, pursuant to sections 1, 4(i), and 4(j), of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), the requests dated September 20, 2002 and October 3, 2002, of Verizon Communications, Inc. ARE DENIED. IT IS FURTHER ORDERED that a copy of this Order shall be sent by Certified Mail/Return Receipt Requested to Verizon Communications, Inc., Joseph DiBella, Regulatory Counsel, 1515 North Courthouse Road, Suit 500, Arlington, Virginia 22201.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

[40] *See Bell Atlantic/GTE Merger Order* at App. D, Attach. A, para. 4 (allowing changes adopted in the New York and California state plans to be imported into the Verizon Performance Plan); *SBC/Ameritech Merger Order* at Appendix C, Attach. A, para. 4 (allowing changes adopted in the Texas and California state plans to be imported into the SBC Performance Plan).